IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

CIVIL REVISION APPLICATION No 1192 of 1998

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Order ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Order ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HEIRS & LRS. OF DECD. PRABHUDAS V CHAUDHARY
VERSUS
SWAMINARAYAN TRUST, SIDHPUR

Appearance:
MR MEHUL SHARAD SHAH for Petitioners
MR NV ANJARIA for Respondent

CORAM : MR JUSTICE S.K. KESHOTE
Date of Order: 26/11/98

C.A.V. ORDER

1. This revision application is directed by the heirs and legal representatives of original defendant-appellant in Regular Civil Appeal No.114/86

pending in the Court of learned Assistant Judge, Mahesana against the order of the first appellate court dated 15th July, 1998 rejecting the application Ex.35 filed under Order 22 Rule 3 and Order 6 Rule 17 of C.P.C. for substitution of heirs and legal representatives of deceased appellant.

2. Learned counsel for the petitioners submitted that the learned first appellate court has committed serious illegality in not condoning the delay which is caused in filing of the application for setting aside of the abatement of the application. Relying on the decision of the Apex Court in the case of State of M.P. vs. S.S. Akolkar reported in AIR 1996 SC 1984 and the decisions of this Court in the case of Mohatta Bros. vs. Sheth Chaturbhujdas reported in 1981 GLH 30 and in the case of Matuben S. Sejpal vs. Anantbhai Tekchand reported in 1995 (1) GLR 351 contended that in the matter of substitution of legal heirs and representatives of deceased party in the appeal or the suit, as the case may be, the courts may take liberal view and delay, if any, caused in filing of the application should be liberally condoned.

3. On the other hand, learned counsel for the respondent contended that the applicants have failed to make out any case of condonation of delay caused in filing of the application for setting aside of the abatement. In support of this contention, he placed reliance on the decision of the Apex Court in the case of State of Gujarat vs. Sayed Mohd. Baquir El Edross reported in 1981 (4) SCC 1. It is further contended that under the impugned order, the learned first appellate court rejected the application of the applicants for setting aside of the abatement as well as for condonation of delay caused in filing thereof. The order of rejection of the application for setting aside of the abatement is appealable under Order 43 Rule 1 of C.P.C. and as such this revision application is not maintainable. Carrying this contention further, learned counsel for the respondents contended that the consequence of dismissal of the application for condonation of delay caused in filing of the application for setting aside of the abatement is the dismissal of the application for setting aside of the abatement and in challenging that order, the applicants could have also raised a ground in the memo of appel against the order of the Court rejecting the application for condonation of delay caused in filing of the said application.

4. In rejoinder to this submissions of the learned counsel for the respondent, learned counsel for the applicants contended that the order rejecting the application for condonation of delay caused in filing of the application for setting aside of the abatement is not appealable and against this order only the civil revision application is maintainable. In the alternate, it is contended that even if it is taken that the applicants could have challenged this order also while challenging the order of the first appellate court dismissing the application filed by them for setting aside of the abatement of the appeal then this revision application may be converted in A.O. as against that order an appeal lies to this Court. Limitation for filing of the appeal is same as that of C.R.A. in this Court and the court fees are also of same quantum both in C.R.A. and A.O..

5. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

6. It is true that in the matter of condonation of delay more so in filing of the application for substitution of heirs and legal representatives in the suit and in the appeal, the courts should take the liberal view. However, taking of the liberal view does not mean and should not be taken that even where the party concerned is unable to make out a case that he or she has been prevented from sufficient cause in filing of the application within limitation still the court is under an obligation to condone the delay in filing of the application. Sine qua non for condonation of delay caused in filing of the application is that the party concerned has to set forth the facts in the application supported by an affidavit on which he or she relies to satisfy the court that he/she had sufficient cause for not filing the application within prescribed period of limitation or for doing the same. So only in case the court is satisfied on the basis of the facts set forth in the application duly supported by an affidavit that the applicant had sufficient cause for not filing the application within prescribed period of limitation then and then only delay caused in filing of the same can be condoned and not otherwise. In case the contention of the learned counsel for the applicants is accepted then what it will amount to that even where the applicants have failed to give out any cause or ground or justification for the delay caused in filing of the application still the court has no option except to condone the delay. That cannot be taken to be the ratio of the decision on which reliance has been placed by the

learned counsel for the applications in support of his contention.

7. Admittedly, Prabhudas Valjibhai Chaudhary the sole defendant-appellant in the appeal has expired on 1-7-1997 and the applicants have not filed the application under Order 22 Rule 3, C.P.C. within 90 days of his death. Similarly, they have also not filed the application for setting aside of the abatement within 60 days thereafter. Learned advocate who was appearing for the defendant-appellant has made a declaration in the form of purshis Ex.33 regarding the death of sole defendant-appellant. When the advocate was knowing about the death of the deceased appellant then it is difficult to accept that the applicants have no knowledge of death of deceased appellant as well as of the appeal. The advocate could have got the information in normal course from the applicants. Despite of these facts, the application for setting aside of abatement has not been filed within limitation and not only this no explanation has been furnished for delay caused in filing thereof. Learned appellate court has not committed any illegality more so material irregularity in exercising its jurisdiction in holding that the applicants have failed to give out any satisfactory explanation for not filing the application for bringing the heirs and legal representatives on record for the period from 24th December, 1997 to 4th March, 1998. So it is a case where the applicants have not filed application immediately after having come to know about the death of defendant-appellant for bringing on record his heirs and legal representatives. The delay caused in filing of the application for setting aside of the abatement has rightly not been condoned. It is a matter of discretion of the Court and normally this Court in its revisional power should not interfere with the discretionary order of the courts below. Learned counsel for the applicant has failed to make out any case that the learned first appellate court acted arbitrarily or perversely in passing of this discretionary order. No doubt it is a discretion to be exercised judicially but on the facts which have come on record I am satisfied that the first appellate court has not acted arbitrarily or perversely in declining to interfere with the discretionary order in favour of the applicants.

8. In the case of State of Gujarat vs. Sayed Mohd. Baquir El Edross (supra) , the Apex Court in para-2 has observed as follows:

2. It is common ground between the parties that on the death of the sole respondent to the appeal the right to sue survived to his legal representatives. No application having been made within 90 days of the death, the appeal abated on March 11, 1979 and an application for having the abatement set aside could have been made within the period of 60 days following that date (Article 121 of the Limitation Act). The application actually made in that behalf was thus time-barred by more than three months and a half. Mr. Phadke, learned counsel for the appellant does not dispute this proposition. He urges, however, that the delay in making the application last mentioned should be condoned and the abatement of the appel set aside. No sufficient cause, however, for the condonation of the delay is made out from any material on the record. As pointed out earlier, the clerk of the learned counsel for the appellant was served with a copy of the application dated February 23, 1979 on that date itself and no reason, good, bad or indifferent is assigned for the failure of that counsel right from February 20, 1979 to August 29, 1979 to move the Court till August 29, 1979 either for having the legal representatives of the deceased brought on the record or for having the abatement set aside after it had taken place. His knowledge of the death of the respondent must be attributed to the appellant State also and his negligence in not moving the Court in time must be deemed to be that of the appellant.

9. In this case, the applicants have failed to assign any reason for condonation of delay caused in filing of the application for setting aside of the abatement. Moreover, even if the application has been filed for setting aside of the abatement within limitation, it is not the routine order to be passed to set aside the abatement.

10. Rule 9 of Order 22 of C.P.C. provides that the Court on application filed, may set aside the abatement of the suit or the appeal if it is proved that the applicant or the applicants, as the case may be, was/were prevented by sufficient cause from continuing the suit. Limitation for filing of such an application has been prescribed but by virtue of sub-rule (3) of Rule 9 of Order 22, proviso to section 5 of Indian Limitation Act shall apply to application under sub-rule

(2) of Rule 9 also. So in the present case, the applicants have to establish two things, firstly that they have been prevented from not filing the application for setting aside abatement within limitation. So only on the satisfaction of this Court on this ground, the Court will first condone the delay caused in filing of the application under Order 22, Rule 9, C.P.C. but that is not the end of the matter. The applicants have further to establish that they were prevented by sufficient cause from continuing the suit then and then only the Court will set aside the abatement. So either way the applicants have failed to make out any cause for condonation of delay caused in filing of the application under Order 22 Rule 9 C.P.C. as well as the ground for setting aside of the abatement of the suit. Learned first appellate court has not committed any illegality much less a material irregularity in exercising its jurisdiction in passing of the impugned order, which calls for interference of this Court. In view of the fact that otherwise also I am satisfied that on merits the applicants have no case I do not consider it to be necessary to go and decide the contention raised by the learned counsel for the respondent regarding the availability of right of appeal against the impugned order.

11. In the result, this civil revision application fails and the same is dismissed. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

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